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PRESIDENTIAL AUTHORITY TO DISPLACE CUSTOMARY
INTERNATIONAL LAW: A DEPARTMENT OF JUSTICE FANTASY

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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38TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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PRESIDENTIAL AUTHORITY TO DISPLACE CUSTOMARY
INTERNATIONAL LAW: A DEPARTMENT OF JUSTICE FANTASY

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ABSTRACT: This thesis analyzes the legal bases of a 1989 Department of Justice (DOJ) opinion that claims the President has the authority to order the Federal Bureau of Investigation to arrest individuals for violations of United States law in a foreign country without that country's consent. The DOJ opinion could have a tremendous impact on United States law enforcement efforts and foreign policies. This thesis concludes that there is no legal basis for the DOJ opinion and argues that the President is bound by customary international law.

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INTRODUCTION

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states.¹

On June 21, 1989, the Department of Justice (DOJ) issued an opinion setting forth the President's authority to order the Federal Bureau of Investigation (FBI) to arrest an individual for violations of United States law in a foreign country without that country's consent.² This opinion reversed the position taken by DOJ on this same issue at the end of the Carter administration.³ Both opinions were detailed analyses of the FBI's statutory authority to investigate⁴ and arrest⁵.

William Barr, the author of the 1989 opinion, testified before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on November 8, 1989.⁶ In his prepared statement, Barr conceded that this unilateral law enforcement action within another state's territory would violate customary international law. Nevertheless, he asserted that "[u]nder our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law."⁷ Barr further testified that the authority to violate

customary international law existed in the form of domestic case law, the Constitution and recently enacted statutes.

The DOJ has refused to release the 1989 opinion.⁸ This makes a detailed critique difficult, but not impossible. Though the political ramifications of the current DOJ opinion are substantial, this analysis will focus on only the legal bases of the 1989 DOJ opinion and the even more basic question of whether domestic legal authority to violate international law is actually required to deal with fugitives from American justice.

DOMESTIC CASE LAW

The threshold question concerns the relationship of United States domestic law and customary international law. At one end of the analytical spectrum is the concept of monism.⁹ Under this analytical theory, both domestic and international law are part of a single legal system. If a conflict arises between domestic and international law, international law takes precedence. Domestic courts are compelled to enforce international law regardless of any contrary action by the state's executive or legislative branches.¹⁰ At the other end of the spectrum is dualism.¹¹ This school of thought views domestic and international law as separate and distinct legal systems. The interrelationship between these systems within a given state is a question for domestic resolution.¹² Quite clearly, the United States stands squarely in the dualism camp.

In his statement, Barr cites Schooner Exchange v. McFadden¹³ and Brown v. United States¹⁴ to demonstrate that customary international law does not serve as an absolute restriction on the United State's sovereign capacity to act. In Schooner, decided in 1812, the Supreme Court concluded that customary international law was indeed part of the domestic law of the United States. Thus, a French warship was immunized from judicial process while in United States territorial waters. The Court also pointed out, however, that a sovereign had the authority to displace customary

international law within its borders.¹⁵

Brown involved the seizure of cargo from a ship taken in United States waters during the War of 1812. The Supreme Court found that customary international law applied to the controversy and ordered restitution be made. The Court described customary international law as a "guide which the sovereign follows or abandons at his will."¹⁶

These cases established that dualism is United States law; international law can be displaced domestically. Many issues remained to be settled, however. Left in doubt were the matters of the kind of international law that could be displaced, the governmental entities that could displace this law and how this displacement might be accomplished.

Barr relies on The Paquete Habana¹⁷ to demonstrate that the President has the authority to displace customary international law.¹⁸ This case involved the seizure of private fishing vessels by the United States Navy during the Spanish-American War. The Supreme Court found that, under customary international law, these vessels should not have been seized and ordered the proceeds of their sale turned over to their original owners.¹⁹

It is Barr's position that the Court, in this case, established a position for customary international law within the hierarchy of United States domestic law with the following language:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. For this purpose, where

there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations...²⁰

Barr contends that these words evidence the fact that the executive and legislative branches, "at least as respects our domestic law...", can "supplant legal norms otherwise furnished by customary international law."²¹

This same quotation is described as "opaque and ambiguous" dictum by Professor Louis Henkin.²² The Supreme Court used this phrase nearly a century ago and has not addressed the issue since. Henkin points out that only one court relied on these words to subordinate customary international law to a "controlling executive or legislative act"²³ and this occurred eighty-six years after The Paquete Habana decision.

The Paquete Habana was an offshoot of a series of Supreme Court cases decided at the end of the last century that wrestled with the displacement of international law within the United States.²⁴ The Chinese Exclusion Case²⁵ of 1889 was the last of these. It dealt with a Congressional act²⁶ that barred the petitioner from returning to the United States and conflicted with prior treaties between the United States and China.²⁷ The Court gave effect to the act of Congress and thus resolved the question of whether treaties could be displaced by Congressional action.²⁸

In The Paquete Habana, the Supreme Court found that the seizure of the vessels by a Navy admiral did

not displace customary international law.²⁹ With the above vague language, however, the Court also implied that both Congress and the President did possess the authority to displace such law. Unfortunately, vague implications oftentimes lead to expansive inferences.

Citing Taq v. Rogers³⁰ and The Over the Top³¹, Barr contends that, since The Paquete Habana decision "... the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law."³² This is simply not true. Neither of the cited cases refers to the existence of any executive authority to depart from customary international law.

Taq dealt with the confiscation by the federal government of property in a New York trust owned by a German national during World War II. This action was taken in accordance with the Trading with the Enemy Act,³³ but violated a preexisting treaty with Germany.³⁴ The court concluded that Congress had the authority to displace this earlier treaty³⁵ a decision that was simply a reiteration of the reasoning set forth in the Chinese Exclusion Case.

The Over the Top was a 1925 District Court case from Connecticut that involved the sale of alcohol in international waters off the United States coast, an act legal under customary international law.³⁶ The court found for the defendant, but, in dicta, also recognized that Congress had the authority to prescribe acts beyond the three nautical mile limit recognized by

customary international law.³⁷ The Court thus recognized once again that Congress had the authority to displace customary international law.³⁸

These cases were little more than variations on the judicial reasoning set forth in Brown, Schooner, Chinese Exclusion and Paquete Habana. Contrary to Barr's position, they did not establish the authority of the executive to depart from customary international law.

Garcia-Mir v. Meese,³⁹ a 1986 decision from the 11th Circuit, with certiorari denied by the Supreme Court, was the first and, to date, the only court decision that concludes that the President can displace customary international law. The appellees in this case were Mariel Cuban refugees who were being detained indefinitely by the federal government. They argued that this "prolonged arbitrary detention" violated customary international law.⁴⁰ The court never reached the merits of this issue. Based on the dictum of the Paquete Habana referred to earlier, the court held that the President had the authority to act in violation of customary international law in this instance.⁴¹

The significance of this decision is still uncertain. It is not a pronouncement from the Supreme Court. Also, it deals with immigration law, an area in which both domestic and international law have traditionally granted very broad authority to the executive and sovereign.⁴²

Henkin criticizes the court's decision because of its failure to include a crucial caveat to its "extreme

dualist position" that the President may "act in derogation of a principle of international law."⁴³ In his view, the President may do this only when he is acting "within his constitutional powers."⁴⁴

Henkin believes Garcia-Mir to be fatally flawed, as the court did not cite any constitutional authority for the continuing detention of the refugees by the President.⁴⁵ Henkin is particularly critical of the language of the decision claiming, for the President, the authority to "disregard international law in service of domestic needs."⁴⁶ In his view, "[t]here is no such principle; neither precedent nor plausible argument supports it. The President cannot disregard international law 'in the service of domestic needs' any more than he can disregard any other law."⁴⁷

GEOGRAPHY AND DOMESTIC CASE LAW

Even had Garcia-Mir conclusively established Presidential authority to displace customary international law, it could not be cited as support for Barr's position. Garcia-Mir, as well as every case cited in his statement before Congress and all other recorded cases dealing with this issue,⁴⁸ refer to the displacement of international law within the territory controlled by the sovereign. There exists no case law that sets forth the authority of either Congress or the President to displace international law outside the territory of the United States.

The only case that speaks to Congressional authority to extend United States jurisdiction beyond United States territory is Over the Top and, even here, the extension of such authority was limited to the right to proscribe certain activities beyond the traditionally recognized three nautical mile territorial limit.⁴⁹ Thus, this case does not recognize an inherent Congressional authority to displace customary international law within the territory of another state. There is no case that recognizes such authority in the President either.

Section 115 of the Restatement (Third) of the Foreign Relations Law of the United States [hereinafter Restatement (Third)] sets forth rules to deal with "Inconsistency Between International Law or Agreement and Domestic Law".⁵⁰ A reporter's note in this section states that Garcia-Mir does indicate that the President

"may have the power to act in disregard of international law," assuming he is acting within his constitutional authority.⁵¹ The section, however, focuses on acts of Congress that supersede international law or, more specifically, an international agreement.

Most interesting for the purposes of this analysis is the following quotation from Restatement (Third): "That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."⁵² The Congress, whose authority to displace international law has been acknowledged for over 150 years, can only displace international law domestically. Even should the President possess a similar authority, it would not be broader than that of Congress.

DUALISM DISTORTED

All of these decisions reaffirmed the concept of dualism in the United States. Brown and Schooner declared that international law was part of United States domestic law and recognized the sovereign's authority to displace international law. Since that time, the cases dealing with this issue have been a confusing effort to establish the position of international law in the hierarchy of United States domestic law. The manner in which international law has been displaced by United States law is settled in some areas, such as that of Congressional action displacing treaties. However, the executive power to displace international law is still evolving. One fact is clear, nevertheless. No case law exists to support Barr's claim that the President can displace international law extraterritorially.

It is ironic that the DOJ opinion relies on dualism as a basis for the violation of state sovereignty. It was the very concept of territorial integrity that served as the foundation for Justice Marshall's establishment of dualism in the United States judicial system.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such a restriction.⁵³

It is one thing to say that a sovereign may control immigration, alcohol sales, service of process and the seizure of enemy property during war within its own territory, regardless of what customary international law may require. It is quite another to say that a state can displace the customary international law of sovereignty within another state's territory. This approach goes beyond even the "extreme dualist position" of Garcia-Mir. It distorts dualism to the extent that it becomes a mere excuse for unilateral intervention in the affairs of sovereign states.

EXECUTIVE POWERS AND RECENT LEGISLATION

Barr also cites the Constitution as authority for a Presidential violation of customary international law. In doing so, he focuses on the executive responsibility and authority set forth in article II, section 3; "...[the President] shall take care that the laws be faithfully executed."⁵⁴ Barr claims this provision alone grants the executive the power to "authorize agents of the Executive Branch to conduct extraterritorial arrests."⁵⁵

Relying on In re Neagle,⁵⁶ an 1889 Supreme Court decision, Barr contends that the "laws" the President must faithfully execute are not limited to affirmative acts of Congress. In Neagle, the Attorney General ordered a federal marshal to protect Justice Field, a Supreme Court justice. While in California, the federal marshal killed a person who attacked Justice Field. The Supreme Court determined that the bodyguard was not subject to California law as a result of the supremacy of federal law. Though there had been no Congressional action authorizing this protection, the Supreme Court ruled that the Attorney General had acted within the authority granted the executive branch by the "faithfully executed" clause of the Constitution.⁵⁷ Referring to this enforcement duty, the Supreme Court posed a rhetorical question.

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution

itself, our international relations, and all protection implied by the nature of the government under the Constitution?⁵⁸

As might be expected, the Court adopted the expansive interpretation of the duty. Barr seizes on this language and combines it with the President's extensive foreign affairs powers.⁵⁹ "Commensurate with these inherent powers, this authority carries with it the power to direct Executive Branch agents to carry out arrests that contravene customary international law and other law principles which our legislature has not acted upon to make part of our domestic law."⁶⁰

Barr thus uses the President's foreign affairs powers to transform a unique and obscure Supreme Court decision into one that supports executive authority to violate international law. The dangers inherent in this quantum leap of logic are clear when the 1989 DOJ opinion is placed into historical perspective.

EVOLUTION OF RECENT LEGISLATION

During the 1960s and 1970s, the international community confronted an epidemic of aircraft hijackings.⁶¹ In response, the vast majority of nations agreed to a series of international conventions dealing with this issue. These agreements identified aircraft hijacking and all related acts as crimes and expanded each signatory's jurisdiction over these offenses.⁶² Congress then enacted implementing legislation,⁶³ as the United States applied concept of dualism requires.⁶⁴

In the latter 70s, there occurred a dramatic growth in both the number and forms of international terrorism.⁶⁵ Unlike the dilemma of aircraft hijacking, the international community could not reach a consensus on how to deal with this problem. The difficulty was as fundamental as the inability to define terrorism.⁶⁶ The Contra rebel, the PLO regular, the Mujaheddin soldier, and the IRA activist were freedom fighters to some, but common criminals to others.

On December 17, 1979, the U.N. General Assembly adopted the International Convention Against the Taking of Hostages,⁶⁷ without vote, and opened it for signature the next day. Ten years later, only 57 states had signed this convention, roughly half the number of signatories of the aircraft hijacking conventions.⁶⁸ Focusing on one particular terrorist act, the Hostage Convention represents a patchwork approach to combating international terrorism. The Convention defines the act of hostage-taking⁶⁹ and requires that a signatory

exercise in personam jurisdiction over the individual concerned by either submitting the case to its "competent authorities" for prosecution or extraditing the individual to another interested signatory.⁷⁰

Although this convention addressed a very narrow area of international terrorism, it nevertheless contained exceptions capable of consuming the rule. Article 9 contains the standard "political offenses" language that enables a signatory to ignore the convention if it concludes the act in issue was more political in nature than criminal.⁷¹ Some authorities have deemed terrorist acts to be political in nature per se.⁷²

Article 12 also contains a significant exception. This provision states that the convention does not apply to armed conflicts, as such conflicts are defined by the 1949 Geneva Conventions and the Protocols to these Conventions.⁷³ The former simply refer to "international armed conflicts."⁷⁴ Additional Protocol I expands this term to include armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."⁷⁵ The United States has refused to ratify this protocol, in great part, because of this expansive definition of "international armed conflict."⁷⁶ In the context of the Hostage Convention, this definition serves as a significant loophole available to any signatory of the convention. Those terrorist acts deemed to be "too criminal" to qualify as "political offenses" may well

be viewed as legitimate actions taken in the context of an "international armed conflict".

The jurisdictional bases set forth in the Hostage Convention include all five bases traditionally recognized, under international law, for the exercise of extraterritorial jurisdiction.⁷⁷ A state may assert jurisdiction over the offense if:

- a. the offense occurs in its territory or aboard ships or aircraft registered in that state (Territorial Principle);
- b. the offender is a national of that state (Protective Principle);
- c. the offense was committed to force that state to do or refrain from doing something (Protective Principle);
- d. the offender is later found in that state's territory (Universal Principle); or
- e. the victim of the offense is a national of that state (Passive Personality Principle).⁷⁸

Until confronted by international terrorism, the United States had not accepted passive personality as a basis for the exercise of extraterritorial jurisdiction.⁷⁹ The United States position on this issue was modified with the passage of the Comprehensive Crime Control Act of 1984,⁸⁰ an implementation of the Hostage Taking Convention. This statute adopted the convention's definition of hostage-taking and all of its extraterritorial jurisdictional bases, to include passive personality.⁸¹

FBI INVOLVEMENT

While these developments were taking place, the FBI became more involved in the investigation and prevention of international terrorism. In 1982, it was designated the lead agency for investigating acts of terrorism committed in the United States⁸² and the responsible agency for investigations abroad when authorized by the State Department.⁸³ As the FBI assumed these functions, Congress dramatically expanded the extraterritorial reach of domestic statutes the FBI was to enforce.

In September, 1987, while still operating under the constraints of the 1980 DOJ opinion that barred its agents from violating the territorial integrity of a state, the FBI lured Fawaz Yunis from Beirut into international waters and arrested him. The warrant was based on violations of the Hostage Taking Act.⁸⁴

In 1985 Yunis, and several other individuals had hijacked a Jordanian airliner at Beirut International Airport with approximately 50 passengers aboard. The hijackers diverted the plane to Tunis, Cyprus, Sicily and then back to Beirut, where they destroyed it with a bomb. The only nexus between the United States and the crime was the fact that three of the aircraft passengers were United States citizens.⁸⁵

In one of several Yunis⁸⁶ decisions, Judge Parker ruled that the Hostage Taking Act was a valid exercise of Congress' extraterritorial legislative authority.⁸⁷

He cited the Hostage Taking Convention and several

international aircraft hijacking agreements as proof of the universal condemnation of these offenses and the international community's acceptance of the passive personality principle as a basis for jurisdiction.⁸⁸

After Yunis reached United States territory, he was also charged with a violation of the Aircraft Sabotage Act.⁸⁹ The particular provision charged required that the accused be physically present in the United States in order for a court to assert jurisdiction.⁹⁰ The court ruled that the initial extraterritorial seizure for a violation of the Hostage Taking Act, which has no "physical presence" requirement, was lawful.⁹¹ The court then found that the subsequent filing of additional charges, after Yunis had been forcibly brought to the United States, was also valid.⁹² Judge Parker added a note of caution, however:

... the decision to permit the government to bring charges against the defendant under this statute [Aircraft Sabotage Act] should not be regarded as giving the government carte blanche to act as a global police force seizing and abducting terrorists anywhere in the world. The government cannot act beyond the jurisdictional parameters set forth by principles of international law and domestic statute.⁹³

It is not clear whether these comments were limited to those instances in which law enforcement agents might attempt to establish jurisdiction over a person by forcibly returning this individual to the United States or whether the judge intended that cautionary statement be given a much broader application. Arguably, these words serve to advise government officials that they must respect the "principles of international law" in all of their extraterritorial law enforcement efforts.

THE ANTITERRORISM ACT

In October 1985, four Palestinian terrorists hijacked the Achille Lauro, an Italian cruise ship, in the Mediterranean Sea. Approximately 400 passengers were aboard, to include twelve United States citizens. During the hijacking, the terrorists murdered a United States national, Leon Klinghoffer. At the time, this act "was not a crime under United States law."⁸⁴

In response, Congress passed the "Omnibus Diplomatic Security and Antiterrorism Act of 1986."⁸⁵ Under the provisions of this statute, it is now a violation of domestic United States law to kill or to cause serious bodily harm to an American national, or to attempt or conspire to do the same, anywhere in the world.⁸⁶ The statute requires that the Attorney General or a high ranking subordinate certify that the offense in question "was intended to coerce, intimidate, or retaliate against a government or a civilian population."⁸⁷

It is noted that any government or civilian population may be the victim of such coercion, intimidation, or retaliation. The statute is not limited to only acts affecting the United States. That is, its jurisdictional basis is not that of the protective principle. Moreover, in this instance, Congress was not implementing, by statute, an already ratified international agreement. Thus, this act constituted the first unilateral use by the United States of the passive personality principle for

establishment of extraterritorial.

When Congress passed this statute, it specifically considered and rejected a "self-help" provision. Senator Specter offered a bill on July 8, 1985 titled the "Terrorist Prosecution Act." According to this proposed statute, when the Attorney General enforced laws prohibiting terrorist attacks on United States citizens, he would be authorized to "request and ... receive assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, and the Federal Bureau of Investigation, any statute, rule, or regulation to the contrary notwithstanding." This law was never enacted. The Congress refused to authorize seizures by United States agents abroad, absent the host country's consent.⁹⁸

When confronted with this legislative history, Barr maintained that this was irrelevant, as he was not relying on this statute to establish the President's authority to act abroad.⁹⁹ Though he did not explain this apparent contradiction, it appears that he was alluding to the alleged Constitutional and case law authority of the President to displace international law to which reference has already been made.

To date, this statute has not served as the basis for a federal prosecution; thus, the constitutionality of this legislation has not been tested.¹⁰⁰ Moreover, it has not been relied upon to justify a United States violation of a state's territorial integrity. Notwithstanding these facts, the passage of this legislation led the FBI to ask that DOJ reconsider its

earlier opinion that noted a lack of any legal basis for a violation of the territorial integrity of another state for the purpose of abducting and arresting a fugitive from United States justice.¹⁰¹ The FBI sought this DOJ action on the assumption that, given the newly enacted legislation providing United States extraterritorial jurisdiction, there would be many more "fugitives" to pursue and that not all of these individuals would conveniently venture into international waters.

In the resulting opinion, Barr relies on the executive's constitutional responsibility to see that "the laws are faithfully executed." Given the United States acceptance of the "passive personality" concept as a basis for the exercise of extraterritorial jurisdiction, the laws that the President must now enforce include two statutes with almost limitless geographic applicability. Barr has taken the position that the President's authority to enforce United States law must be co-extensive with the extraterritorial reach of United States domestic statutes.¹⁰² In doing so, he confuses the authority to prescribe with the authority to enforce.

The acceptance by members of the international community of "passive personality" as a basis for the exercise of jurisdiction in the form of the Hostage Taking Convention¹⁰³ did not constitute a waiver of their sovereignty. As pointed out earlier, the "political offense" language of Article 9 and the expansive definition of "armed conflict" in Article 12

clearly indicate that the signatories intended to guard their territorial independence jealously.

EXTRADITION

Every sovereign state has domestic laws it wishes to enforce beyond its borders. The United States is no exception. The problem arises when one state attempts to exercise its authority over individuals located within the territory of another sovereign state. The concept of extradition is designed to strike a balance between the sanctity of one state's territorial integrity and the law enforcement interests of another.¹⁰⁴

The United States is a signatory to more than 100 bilateral extradition treaties, as well as many multilateral treaties that include an obligation to "prosecute or extradite," aut dedere aut iudicare¹⁰⁵ Although the extradition process is often cumbersome and slow¹⁰⁶ it has proven to be effective, nevertheless, in the recent campaign against Colombian drug lords. In less than a year, the Colombian government has extradited more than a dozen individuals under indictment in the United States for drug related offenses.¹⁰⁷

There are also "informal" methods of extradition, such as exclusion and deportation.¹⁰⁸ These have been criticized by some publicists; however, they have been used effectively by states to shorten the traditional extradition process.¹⁰⁹

In contrast, abduction has never been accepted by the international community as a valid method of law enforcement. Notwithstanding this fact, many states

have kidnapped fugitives in the territory of another state without that state's consent.¹¹⁰ The end result of these actions have ranged from the prosecution and execution of the fugitive by the abducting state¹¹¹ to the prosecution of the fugitive and extradition of the kidnappers to the state whose territorial integrity had been violated.¹¹²

Judge Abraham Sofaer, Legal Advisor to the Department of State, has noted that, "... we are aware of no State that treats an abduction as an illegal arrest for purposes of its own law when the abducted individuals are being prosecuted."¹¹³ Moreover, the United States does subscribe to the principle of male capere bene detentio.¹¹⁴ This, however, begs the question of the abduction's legality under international law.

Judge Sofaer also appeared before Congress when Antiterrorism Act was being considered. He testified, in part, as follows:

I was glad to see that the bill does not provide for any "self-help" measures. The Due Process clause of the Constitution does not automatically preclude U.S. courts from trying persons forcibly seized abroad by U.S. authorities. It would be wrong, however, to extrapolate from this the conclusion that such seizures themselves are perfectly lawful. ... In general, seizure by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of the foreign State, could violate local kidnapping laws, and might be viewed by the foreign State as a violation of international law and as incompatible with any bilateral extradition treaty in force.¹¹⁵

United States law dictates that extradition requests be considered only in accordance with a treaty.¹¹⁶ Securing jurisdiction by means of an illegal abduction obviously results in the complete vitiation of the extradition concept.

THE DAMAGE DONE

The effect of the DOJ opinion is yet to be determined. The State Department and FBI have already had to reassure many foreign governments that the United States does not plan to engage in extraterritorial arrests, absent a host nation's consent.¹¹⁷ It is evident that the international community does not agree with the concept that the United States has the authority to violate the territorial integrity of other states in order to enforce United States law. As a result of the opinion, the international cooperation vital to combatting terrorism and drug trafficking may wane. Moreover, states may hesitate to adopt the Convention Against Illicit Traffic In Narcotic Drugs and Psychotropic Substances,¹¹⁸ fearing that the United States will view their acceptance of the "passive personality" concept as an implicit waiver of sovereignty.

Another troubling aspect of the DOJ opinion is the potential breadth of its applicability. Though the opinion focuses on the President's use of the FBI for law enforcement overseas, the logic and conclusions put forward could well be applied to the President's use of other United States agencies or departments for overseas law enforcement.

On November 3, 1989 Barr authored another DOJ opinion. This opinion concluded that the Posse Comitatus Act¹¹⁹ did not apply outside the territory of the United States.¹²⁰ This act bars the use of the Army

or Air Force for domestic law enforcement purposes.¹²¹ Though a discussion of the Posse Comitatus Act is beyond the scope of this study, Barr's opinion dealing with this Act must be read in conjunction with the conclusions he reached in his June, 1989 opinion. Thus, if the President can use the FBI to "displace" customary international law, he seemingly may now use the 82d Airborne Division for this same purpose. In brief, any Presidential reliance on the June, 1989 DOJ opinion to justify a unilateral United States law enforcement action overseas would be ill-advised.

A DIFFERENT PERSPECTIVE

During the 18th and 19th centuries, law enforcement and national defense interrelated to some extent, but, by and large, these functions were separate and distinct. Typically, law enforcement was a domestic concern, the maintenance of order within the United States. The manner in which domestic law applied extraterritorially was not of particular significance. United States national defense focused on the protection of United States territory and national interests from external threats. The important issues, then, were who would conduct United States foreign policy and control its armed forces.

With the development of international commerce, travel and communication, traditional geographic boundaries have begun to disappear. The threats to United States national interests are no longer posed exclusively by the military forces of its enemies. These threats now include isolated terrorist cells attacking innocent United States citizens overseas simply because of their nationality. Frequently, these terrorists are based in the territory of nations unfriendly to the United States.¹²² Internal social order is now endangered by drug production and distribution occurring far beyond United States shores. Law enforcement within the United States, in some ways, depends upon effective law enforcement outside the United States. The distinction between national defense and law enforcement has become blurred.

Referring to the threat posed by international terrorist groups to United States national security interests Barr wrote: "The extraterritorial enforcement of United States laws is of growing importance to our ability to protect vital national interests."¹²³

This statement is important in two ways. First, it points the way to other domestic sources of authority that, when joined with the President's responsibility to "faithfully execute" the laws, extraterritorial Presidential action. Secondly, it reveals a very egocentric, American viewpoint that obscures principles of international law which also may be cited as support for unilateral United States actions.

ADDITIONAL PRESIDENTIAL POWERS

By definition, extraterritorial law enforcement involves the foreign affairs powers of the President. These are both ill-defined and exceptionally broad. In United States v. Curtiss-Wright Corp.,¹²⁴ Justice Sutherland, writing for the Supreme Court, noted:

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.¹²⁵

Foreign affairs authority is also vested solely in the President. "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."¹²⁶

It is interesting to consider the logical implications of Justice Sutherland's opinion. The President's foreign affairs powers are rooted in the sovereignty of the nation. The sovereignty of the nation is defined by general principles of international law. Thus, the President's foreign affairs powers must be limited by these same general principles of international law.

When United States national security is threatened, the President's authority as Commander-In-Chief¹²⁷ must also be added to the equation. Efforts by

Congress to limit the presidential powers as Commander-In-Chief have met with mixed results.¹²⁸ The Constitutional limitations on Presidential authority to use the armed forces are beyond the focus of this discussion. Suffice it to say, however, that this power is also broad, ill-defined and the source of controversy.¹²⁹ For the purposes of this study, it is enough to recognize that the President may use the armed forces beyond the borders of the United States to protect the "vital national interests" of the nation.¹³⁰

The courts have traditionally avoided defining the parameters of the President's powers as Commander-In-Chief, labeling issues relating to these powers as political and nonjusticiable.¹³¹ Barr would have us believe that Youngstown Sheet & Tube Co. v. Sawyer¹³² was an exception to this rule when he quotes from Justice Jackson's concurring opinion. "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."¹³³

Actually, this language is dicta. Youngstown involved President Truman's seizure of coal mines in April, 1952. The Supreme Court determined that this action violated the Constitution. Justice Black wrote the opinion of the court, and five justices wrote separate concurring opinions. In his opinion, shortly following the language quoted by Barr above, Justice Jackson went on to write that the President's authority

as Commander-In-Chief did not constitute a valid basis for his actions.¹³⁴ Thus, Barr has attempted to capitalize on gratuitous language in a concurring opinion in order to support his expansive position concerning Presidential authority as the Commander-in-Chief.

A recent effort by the Supreme Court to further define presidential authority was Dames & Moore v. Reagan.¹³⁵ This case dealt with the President's authority, under the International Emergency Economic Powers Act,¹³⁶ to freeze and release the property of a foreign government during a declared national emergency, the Iran-hostage crisis. Justice Rehnquist delivered the opinion of the Court and refined Youngstown.

In Youngstown, Justice Jackson devised three categories of presidential action and ascribed to each varying degrees of judicial deference.¹³⁷ Justice Rehnquist wrote, "...it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."¹³⁸ Presidential actions that have the 'explicit congressional authorization' are entitled to the 'strongest of presumptions'.¹³⁹ But when the President acts against an 'explicit congressional prohibition ... his power is at its lowest ebb.'¹⁴⁰

This language is particularly significant in relation to the Antiterrorist Act. As earlier noted,

when Congress passed this statute, it considered and rejected a "self-help" provision.¹⁴¹ Congress thus intentionally did not include the authority to seize fugitives extraterritorially without the consent of the country in which they were found. Though Congress did not explicitly prohibit such action, the legislative intent is clear. Accordingly, if the President's actions are based solely on this statute, his power will be approaching its "lowest ebb" on Justice Rhenquist's spectrum.

THE FBI ENABLING STATUTES

The specific statutes upon which both DOJ opinions focus authorize the FBI to investigate and arrest.¹⁴² Barr points out that this authority is granted "without any express geographic limitation."¹⁴³ He reasons that, "...because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general enabling statutes in a manner that precludes the exercise of this authority."¹⁴⁴ As noted, the existence of this Presidential authority remains to be proven.

Barr also claims that these statutes "...confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI's conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to do so."¹⁴⁵ Here, Barr is correct.

"Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."¹⁴⁶ It is possible to interpret the statutes in issue in a manner consistent with principles of international law. The statutes authorize the FBI to arrest a fugitive in the territory of another state, with that state's consent, as does international law. This rule of construction seems all the more appropriate when one considers that both enabling statutes predate the acceptance of the

"passive personality" jurisdictional concept by the United States.¹⁴⁷

Thus, the domestic authority of the President to order the arrest of fugitives extraterritorially is based upon all three of the constitutional powers to which reference has been made: to see that United States laws are faithfully executed, to conduct United States foreign policy, and to protect the national security. The enabling statutes are domestic laws that authorize the FBI to investigate and arrest. The President may use the FBI in a way that is consistent with all of the powers he has been granted under the Constitution. This provides the President with the power to act, but it is only part of the answer.

APPENDIX A

DOJ v. THE STATE DEPARTMENT

Barr's contention that the extraterritorial enforcement of United States law is of growing importance to United States "vital national interests" reveals the fundamental problem associated with the 1989 DOJ opinion. Its perspective is skewed. The opinion interprets domestic case law and statutes from an egocentric, American point of view. Barr resembles the biased scientist who arrives at his conclusions and then conducts experiments in order to support them. This lack of objectivity obscures a principle source of authority for extraterritorial, unilateral action by the President: international law.

Were a state faced with a choice between the protection of the "vital national interests" to which Barr makes reference, or compliance with international law, compliance would be the exception rather than the rule. Such is not the case, however, for international law also provides the authority for United States protection of its vital national interests. Strangely enough, the very system of laws Barr claims the President may violate, provides the President with the authority to accomplish his goals.

Judge Sofaer testified before the same subcommittee that heard the testimony of Mr. Barr. Sofaer's statement before that subcommittee and a recent article he authored¹⁴⁸ set forth the current State Department position regarding use of force to combat terrorism. Sofaer suggests that the issue must

be addressed as one of national defense, not law enforcement. "To deal effectively with state-sponsored terrorism requires treating its proponents not merely as criminals, but as a threat to our national security."¹⁴⁹ As might be expected, this is consistent with National Security Defense Decision (NSDD) 138, issued by President Reagan in April 1984.¹⁵⁰ That still classified document describes terrorism as a threat to United States national security and claims the right of self-defense in combatting it.¹⁵¹

During the hearing before the subcommittee it appeared that Barr and Sofaer had very different opinions about the President's authority to order the seizure of individuals suspected of violating United States laws in a foreign country without that state's consent. The chairman, Mr. Edwards, commented "I'm curious as to why we have two departments obviously at odds."¹⁵² Barr responded that DOJ and the State Department were not in disagreement. But they did, in a most fundamental way.

Barr said that

...after the President determines that it's in the national interest to pursue a particular law enforcement operation overseas, that judgement, as a matter of domestic law, overrides customary international law, and that is an authorized, legal, constitutional action for American agents to engage in. At the same time, it is a violation, or under many circumstances it could be a violation of international law and we would have to be prepared to take the consequences of that violation.¹⁵³

The Chairman then had this exchange with Judge Sofaer:

Mr. Edwards: Is it your testimony that if the President decides that there is some drug guy in Colombia, for example, that is so menacing to the United States that that alone would be of sufficient danger to the United States so that Mr. Revell [Associate Deputy Director of the FBI] could send in some FBI agents?

Judge Sofaer: No, Mr. Chairman. My testimony would be that there would have to be specific acts or dangers that amounted to an attack on the United States under the U.N. Charter, and that the President would then have to be able to act in self-defense, which requires action that does not go beyond what is necessary and proportional.¹³⁴

According to Barr, if the President determines it is 'in the national interest', the FBI may violate the territorial integrity of another state and seize an individual suspected of violating United States laws. This subjective standard is far from Sofaer's position which acknowledges that the President does not have the authority to order the violation of a state's territorial integrity unless criteria established in customary international law have been met.

STATE-SPONSORED TERRORISM

Sofaer concedes that territorial integrity is a "fundamental attribute of sovereignty,"¹⁵⁵ but points out that it is not entitled to "absolute deference in international law."¹⁵⁶ "[O]ur national defense requires that we claim the right to act within the territory of other States in appropriate circumstances."¹⁵⁷ This right, however, is limited. "The violation of a State's territorial integrity must be based on self-defense."¹⁵⁸

Article 51 of the United Nations Charter reserves the "inherent right of individual or collective self-defense if an armed attack occurs."¹⁵⁹ The United States has consistently interpreted "inherent" and "armed attack" expansively. "The United States has long assumed that the inherent right of self-defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities."¹⁶⁰ The definition of armed attack must allow a state to "effectively...protect itself and its citizens from every illegal use of force aimed at the State."¹⁶¹ Sofaer believes this broad interpretation of the Charter is essential for any state combatting terrorism.

A good illustration of United States policy is the Libyan air strike of 1986. Based on persuasive intelligence reports¹⁶² the United States established that the Libyan government had directed a terrorist

bombing of a discotheque killing two and wounding another seventy-eight United States citizens in West Berlin on 5 April 1986. There were also continuing reports that Libya was planning additional attacks against United States nationals.¹⁸³ In an act of anticipatory self-defense, the United States bombed five Libyan bases that had been linked to the training of international terrorists.

The discotheque bombing established the imminence of the terrorist threat created by Libya. Terrorists trained and directed by the Libyan government had now demonstrated their ability to strike. The United States response was a measured one using only the force necessary to deal with the threat.¹⁸⁴ The United States argued that this was a valid act of self-defense under the principles of customary international law.¹⁸⁵ "The ultimate remedy for a State's knowingly harboring or assisting terrorists who attack another State or its citizens is self-defense."¹⁸⁶

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The terrorism sponsored by the state of Libya, however, is qualitatively different from acts of terrorism that are not sponsored by a state. The United States could reasonably argue that Libya's actions constituted an "armed attack" and invoke the right of self-defense. Moreover, the state whose territorial integrity was violated was the state responsible for the terrorism. Barr does not condition the President's authority to violate a state's territorial integrity on that state's responsibility for the act of terrorism. Barr does not condition that authority at all.

Barr ignores some very basic facts. Not every act of terrorism against United States interests is state-sponsored or constitutes an "armed attack". Not every state-sponsored terrorist finally located is in the state that sponsored the attack. Those terrorist acts which have no state-sponsorship are criminal acts and require international cooperation in the law enforcement arena. They do not authorize, under domestic or international law, the President to violate the territorial integrity of any state.

CONCLUSION

Barr contends that the President has the authority to "displace" customary international law when he, in his sole discretion, determines violating another state's territorial integrity is "in the national interest." Barr manipulates dualism, case law, statutes and the Constitution to create this Presidential authority.

Contrary to Barr's position, the President is bound by international law. There is no Constitutional provision, no statute, and no case that authorizes the President to displace customary international law beyond the territorial boarders of the United States. The President does not have the authority under either domestic or customary international law to violate the territorial integrity of any state for the purposes of enforcing the laws of United States. The Constitution and enabling statutes give him the power to use the FBI extraterritorially. That use, however, must be in conformance with general principles of customary international law. The President must obey international law rather than "displace" it.

1. J. Brierly, The Law of Nations 162 (6th ed. 1963).
2. This opinion has not been published. For a general explanation of the opinion see Statement of William Barr (Ass't Attorney General, Office of Legal Counsel, U.S. Dep't of Justice), The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 101st Cong., 1st Sess.(1989) [hereinafter W. Barr](copy at appendix A). See also Statement of Abraham Sofaer (The Legal Advisor, U.S. Dep't of State), The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 101st Cong., 1st Sess.(1989)(copy at appendix B).
3. U.S. Dep't of Justice, Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. O.L.C. 543 (1980).
4. 28 U.S.C. sec. 533(1) (1982).
5. 18 U.S.C. sec. 3052 (1988).

6. William Barr, Assistant Attorney General, Office of the Legal Counsel, Abraham Sofaer, Legal Advisor, Department of State, and Oliver Revell, Associate Deputy Director-Investigation, FBI, all testified the same day. The record of their testimony before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 1st Sess. November 8, 1989, has not been published. It is available for public inspection at room 806, House Annex Number One, Washington, D.C.

7. W. Barr, supra note 2, at 4.

8. Id. at 3.

9. I. Brownlie, Principles of Public International Law 33-36 (3d ed. 1979). See also Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 Harv. L. Rev. 853, 864-66 (1987).

10. Henkin, supra note 9, at 864.

11. Id. at 865.

12. Id.

13. 11 U.S. (7 Cranch) 116 (1812).

14. 12 U.S. (8 Cranch) 110 (1814).

15. 11 U.S. at 146.
16. 12 U.S. at 128.
17. 175 U.S. 667 (1899).
18. W. Barr, supra note 2, at 5.
19. 175 U.S. 714.
20. 175 U.S. at 700.
21. W. Barr, supra note 2, at 5.
22. L. Henkin, supra note 9, at 879.
23. Id. at 874.
24. Whitney v. Robertson, 124 U.S. 190 (1880), Head Money Cases, 112 U.S. 580 (1884), Chinese Exclusion Case, 130 U.S. 581 (1889).
25. 130 U.S. 581 (1889).
26. For a detailed review of the historical background that led to these restrictions on immigration and the specific acts involved see L. Henkin, supra note 9, at 854-56 & n.12.
27. Treaty of Peace and Friendship, 3 July 1844, United States-China, 8 Stat. 592; Treaty of Peace and Friendship, June 1858, United States-China, 12 Stat. 1023; Additional Articles to the Treaty of Peace and Friendship of 1858, 28 July 1868, United States-China, 16 Stat. 739. See generally 130 U.S. at 590-594.
28. 130 U.S. 602.
29. 175 U.S. at 714.
30. 267 F.2d 664 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960).
31. 5 F.2d 838 (D. Conn. 1925).
32. W. Barr, supra note 2, at 6.

33. 50 U.S.C. app. sec. 39 (1982).

34. Treaty of Friendship, Commerce and Consular Rights, Dec. 8, 1923, United States-Germany, 44 Stat. 2132, as amended, 49 Stat. 3258 (1925).

35. 267 F.2d at 668.

36. 5 F.2d at 842.

37. Id.

38. Id.

39. 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986).

40. Id. at 1453.

41. Id. at 1455.

42. See J. Brierly, supra note 1, at 74-76. See generally L. Henkin, supra note 9.

43. L. Henkin, supra note 9, at 882.

44. Id. at 884.

45. Id.

46. 788 F.2d at 1455.

47. L. Henkin, supra note 9, at 885.

48. See Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973), The Over the Top, 5 F.2d 838 (D. Conn. 1925), Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959), Chinese Exclusion, 130 U.S. 581 (1889), Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), Schooner Exchange, 11 U.S. (7 Cranch) 116 (1812).

49. 5 F.2d at 843.

50. See Restatement (Third) of the Foreign Relations Law of the United States, sec. 115, (1987)[hereinafter Restatement (Third)].

51. Id. at note 3.

52. Restatement (Third), supra note 50, at sec. 115 (1)(b).

53. 11 U.S. (7 Cranch) at 156.

54. U.S. Const. art II, section 3.

55. W. Barr, supra note 2, at 9.

56. 135 U.S. 1 (1890).

57. Id. at 75.

58. Id. at 64.

59. See infra p. 32.

60. W. Barr, supra note 2, at 10.

61. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, 83 Am.J.Int'l. L. 880, 884 n.24 (1989).

62. The Tokyo Convention, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 7192; The Hague Antihiijacking Convention, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; The Montreal Sabotage Convention, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570. See also Lowenfeld, supra note 61, at 885.

63. The U.S. already had domestic legislation relating to aircraft piracy and related acts. The Federal Aviation Act of 1958 (49 U.S.C. sec. 1301 (1958)) had been amended in 1961 to include "aircraft piracy" and associated acts and threats of violence, on board 'an aircraft in flight in air commerce'. Lowenfeld, supra note 61, at 884. See 49 U.S.C. sec. 1472 (1982). Subsequent acts of Congress refined the definitions of the crimes and expanded jurisdiction in accordance with the international conventions seen at note 60.

Jurisdiction based on the registry of the aircraft was created in 1969, see 49 U.S.C. sec. 1301(32)&(38) (1982). The Antihiijacking Act of 1974 implemented the universality principle of the Hague Convention by claiming jurisdiction over offenses committed on aircraft that later land in the U.S. with the suspect aboard and over offenses occurring wholly outside the U.S. when the perpetrator is later discovered in the U.S. See Pub. L. No. 93-366, tit. I, 88 Stat. 409 (1974). See generally Lowenfeld, supra note 61, at 884-87.

64. Restatement (Third), supra note 50, at sec. 111(4).

65. J. Murphy, Punishing International Terrorists, 108-122 (1985).

66. Id. at 3.

67. GA Res. 34/146 (Dec. 17, 1979), reprinted in 18 ILM 1456.

68. As of 1 January 1990 the Hostage Convention had 57 signatories; the Tokyo Convention had 131 signatories; the Hague Convention had 139 signatories and the Montreal Convention had 138 signatories. See U.S. Department of State, Treaties In Force 282-284, 376-377 (1989), and U.S. Department of State, Current Actions, 89 Bull. 2142-2153 (1989).

69. "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person ... in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ... within the meaning of this Convention." The Hostage Taking Convention, supra note 67, at art. 1.

70. The Hostage Taking Convention, supra note 67, at art. 8.

71. The Hostage Taking Convention, supra note 67, at art. 9. See also Findlay, Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law, 23 Tex. Int'l L.J. 1 (1988).

72. See generally International Terrorism and Political Crime (M. Bassiouni ed. 1975).

73. The Hostage Taking Convention, supra note 67, at art. 12.

74. Common Article 2 of the 1949 Geneva Conventions refers to armed conflicts between signatories. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365. See Aldrich, Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I, 26 Va. J. Int'l L. 693 (1986).

75. Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims in International Armed Conflict (Protocol I), art. 1, para. 3, U.N. Doc. A/32/144, Annex I, reprinted in 16 I.L.M. 1391; Official Document Section 72 Am. J. Int'l L. 457 (1978).

76. See generally Roberts, The New Rules for Waging War: The Case Against Ratification of Additional Protocol I, 26 Va. J. Int'l L. 109 (1985). See also Aldrich, supra note 74.

77. See Harvard Research in International Law, Jurisdiction With Respect to Crime, 29 Am. J. Int'l L. Supp 435 (1935). See also Recent Development, U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping?, 18 Vand. J. Int'l L. 915 (1985).

78. The Hostage Taking Convention, supra note 67, at art. 5.
79. Lowenfeld, supra note 61, at 887.
80. 18 U.S.C. sec. 1203 (1988).
81. Id. at sec. 1203(b).
82. See the unpublished Statement of Oliver Revell (Associate Deputy Director-Investigations, Federal Bureau of Investigations) Opening Statement Before An Open Session of the Subcomm. on Civil and Constitutional Rights, Committee on the Judiciary, 101st Cong., 1st Sess. (Nov. 8, 1989) (copy at appendix C).
83. Id. at 1.
84. United States v. Yunis, 681 F.Supp. 896, 899 (1988).
85. Lowenfeld, supra note 61, at 880-881.
86. United States v. Yunis, 681 F.Supp. 891; 896; 909 (D.D.C.1988).
87. 681 F.Supp. 896, 905.
88. Id. at 900-902.
89. Id. at 906.
90. 18 U.S.C. sec. 32(b) (1988).
91. 681 F.Supp. 896, 906.
92. Id.
93. Id.
94. Findlay, supra note 71, at 44. Shortly after the Achille Lauro affair Judge Sofaer wrote:

Important gaps do exist in the legal structure that governs terrorist acts, and

the Reagan Administration is working with Congress and with other nations to close them. For example, the U.S. government lacks a domestic legal basis to prosecute the terrorists who killed an American citizen, Leon Klinghoffer, during the October 1985 Achille Lauro cruise ship hijacking, or the terrorists who killed four American civilians on a hijacked Trans-World Airlines flight earlier that year.

Sofaer, Terrorism and the Law, 64 Foreign Aff. 901, 902 (1986). See also Recent Development, supra note 77.

95. 18 U.S.C. 2331 (Supp. 1986).

96. Id.

97. Id. sec. 2331(e).

98. Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Governmental Employees and Citizens Abroad: Hearing on S. 1337, S. 1429, and S. 1508 Before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 7 (1985).

99. James Dempsey, assistant counsel to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, questioned Barr during his appearance before the Subcommittee on November 8, 1989. See the unpublished record of testimony, supra note 6, at 55.

100. Lowenfeld, supra note 61, at 891-892.

101. W. Barr, supra note 2, at 1-2.

102. Id. at 8.

103. The Hostage Taking Convention, supra note 67.

104. See generally M. Bassiouni, International Extradition and World Public Order, (1974).

105. Findlay, supra note 69, at 9.

106. Id. at 6-16.

107. Washington Post, Jan. 19, 1990, at 17, col. 5.

108. J. Murphy, supra note 65, at 81-93.

109. See M. Bassiouni, supra note 72, at 343. See also Findlay, supra note 71, at 7.

110. M. Bassiouni, supra note 72, at 346-352.

111. See Attorney General of Israel v. Adolf Eichmann, 36 I.L.R., 5 (D. Ct. Jerusalem 1961), aff'd, 36 I.L.R., 277 (Supreme Court, Israel 1962).

112. See Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987). See also Kear v. Hilton, 699 F.2d 181 (1983).

113. Sofaer, The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense, 126 Mil. L. Rev. 89, 111 (1989).

114. See Ker v. Illinois, 119 U.S. 436 (1888); Frisbie v. Collins, 342 U.S. 519 (1952). See also Findlay, supra note 71, at 17.

115. Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Governmental Employees and Citizens Abroad: Hearing on S. 1337, S. 1429, and S. 1508 Before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 69 (1985).

116. 18 U.S.C 3181, 3184 (1988). See also Restatement (Third), supra note 50, at sec. 475.

117. See the unpublished record of testimony, supra note 6, at 56.

118. 28 I.L.M. 493 (1989).

119. 18 U.S.C. sec. 1385 (1988).

120. Unpublished DOJ opinion entitled Memorandum for General Brent Scowcroft, Assistant to the President for National Security Affairs, National Security Council, Re: Extraterritorial effect of the Posse Comitatus Act, November 3, 1989.

121. "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Acts of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. sec. 1385 (1988).

122. Sofaer, supra note 113, at 3.

123. W. Barr, supra note 2, at 1.

124. 299 U.S. 304 (1936).

125. Id. at 318.

126. Id. at 319.

127. U.S. Const. art. II, section 2.

128. The War Powers Resolution, 50 U.S.C. sec. 1541-1548 (1982).

129. L. Henkin, Foreign Affairs and the Constitution, 50-54 (1972). See also Sofaer, supra note 113, at 113.

130. L. Henkin, supra note 129, at 53.

131. Soltzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967); Rappenecker v. United States 509 F. Supp. 1024 (N.D. Cal. 1980).

132. 343 U.S. 579 (1952).

133. Id. at 645.

134. Id.

135. 453 U.S. 654 (1981).

136. 50 U.S.C. sec. 1701-1706 (1982).

137. 343 U.S. at 637.

138. 453 U.S. at 669.

139. 343 U.S. at 637. Cited with approval in 453 U.S. at 668.

140. 343 U.S. at 637-638. Cited with approval in 453 U.S. at 669.

141. See infra. p. 22.

142. 28 U.S.C. sec. 533(1) (1982) and 18 U.S.C. sec. 3052 (1988).

143. W. Barr, supra note 2, at 7.

144. Id. at 8.

145. Id. at 7.

146. See Restatement (Third), supra note 50, at sec. 114.

147. The authority to investigate, 28 U.S.C. sec. 533(1), was first enacted in 1926 and the authority to arrest, 18 U.S.C. sec. 3052, dates back to 1948. The first acceptance of the passive personality principle as a jurisdictional basis in the U.S. occurred in 1984 with the enactment of the Comprehensive Crime Control Act, 18 U.S.C. sec. 1203.

148. Sofaer, supra note 113.

149. Id. at 90.

150. Terry, Countering State-Sponsored Terrorism, 36 Naval L. Rev. 159, 166 (1986).

151. Id.

152. See the unpublished record of testimony, supra note 6, at 42.

153. Id. at 45.

154. Id. at 61.

155. Sofaer, supra note 113, at 106.

156. Id.

157. Id.

158. Id. at 109.

159. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. Charter art. 51.

160. Sofaer, supra note 113, at 93.

161. Id. at 92.

162. Terry, supra note 150, at 181-184.

163. Id.

164. Id. at 83.

165. N.Y. Times, Apr. 15, 1986, at A-10, col. 1, and A-11, col. 4.

166. Sofaer, supra note 113, at 103.



Department of Justice

STATEMENT

OF

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OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

ON

THE LEGALITY AS A MATTER OF DOMESTIC LAW OF
EXTRATERRITORIAL LAW ENFORCEMENT ACTIVITIES
THAT DEPART FROM INTERNATIONAL LAW

BEFORE THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 8, 1989

Mr. Chairman and Members of the Subcommittee:

I am pleased to be with you today to discuss the extent to which the United States has authority under its own domestic laws to carry out extraterritorial arrests which may depart from principles embodied in international law.

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. Many of these criminal organizations target the United States and United States citizens while operating from foreign sanctuaries. While many nations have cooperated in our efforts to combat terrorism and narcotics trafficking by entering into extradition agreements and providing us with other forms of assistance, some foreign governments have unfortunately failed to take steps to protect the United States from these predations, and others actually act in complicity with these groups. Congress has enacted laws to criminalize certain terrorist conduct wherever it occurs, such as 18 U.S.C. § 1203 (implementing International Convention Against the Taking of Hostages) and 18 U.S.C. § 2331 (terrorist acts abroad against United States nationals). Viewed against this backdrop, the extraterritorial enforcement of United States laws is of growing importance to our ability to protect vital national interests.

It was in this context -- particularly in the face of the growing menace of anti-U.S. terrorism -- that the Office of Legal

Counsel reexamined an opinion that it had issued in the last year of the Carter Administration. 4B Op. O.L.C. 543 (March 31, 1980) (the "1980 Opinion"). The 1980 Opinion had potentially broad ramifications for the conduct of extraterritorial law enforcement activities by the Federal Bureau of Investigation ("FBI") and other Executive Branch officials. The question presented was whether the FBI had the authority under United States law to arrest a fugitive in a foreign country without that country's consent under classic principles of customary international law. Assuming on the facts before them that the apprehension in question would most likely constitute a violation of customary international law, the authors of the 1980 Opinion determined that the FBI had no authority under domestic law to perform such an arrest. The 1980 Opinion based its conclusion on two separate grounds.

First, the 1980 Opinion determined that "U.S. agents have no law enforcement authority in another nation unless it is the product of that nation's consent," reasoning that the authority of the United States, as a sovereign, is necessarily "limited . . . by the sovereignty of foreign nations." 4B Op. O.L.C. at 551. In other words, the 1980 Opinion suggested that the President and the Congress are legally powerless under United States law to authorize action in a foreign country that departs from customary international law. Second, regardless of whether the United States, as a sovereign, has the authority to act in contravention of customary international law, the 1980 Opinion

concluded that the FBI could never make apprehensions in contravention of customary international law under its general enabling statutes. Although the statutes themselves do not restrict the extraterritorial reach of the agency's authority, the 1980 Opinion reasoned that they must be construed restrictively to preclude the FBI from departing from customary international law norms in all circumstances.

Because such limitations may impair our ability to defend ourselves from overt physical assaults on our citizens by terrorists and the equally pernicious large-scale trafficking of drugs into the United States by foreign criminal organizations, the FBI asked the Office of Legal Counsel to reexamine the 1980 Opinion. On June 21, 1989, we issued an opinion partially reversing the 1980 Opinion (the "1989 Opinion").¹ Although the content of the 1989 Opinion, like other advice rendered by Office of Legal Counsel, must remain confidential, I am happy to share with the Committee our legal reasoning and conclusions.

Before turning to these legal issues, I think it is important that the Committee understand exactly what the 1989 Opinion did and did not do. Although the 1989 Opinion has been characterized by the press as a document that changed Department of Justice policy, the 1989 Opinion did no such thing. It is strictly a legal analysis of the FBI's authority, as a matter of

¹ The 1989 Opinion reaffirmed the conclusion reached in the 1980 Opinion that, absent cruel or outrageous treatment, the mere fact that a fugitive is brought within the jurisdiction of a United States court against his will would not impair the court's power to try him.

domestic law, to conduct extraterritorial arrests of individuals for violations of United States law. The 1989 Opinion expressly takes no position supporting or opposing, as a policy matter, the use of the FBI or any other Executive Branch officials to make apprehensions in contravention of customary international law. It explicitly cautions that -- apart from the question of legality under domestic law -- such operations raise serious policy considerations that obviously must be carefully weighed. Moreover, the 1989 Opinion does not address the legal implications of deploying the FBI in violation of provisions of self-executing treaties or treaties that have been implemented by legislation.

Now let me turn to the reasons we think the 1980 Opinion was flawed. The 1980 Opinion expressed the view that the United States, as a sovereign, has no authority under its own laws to conduct law enforcement operations in another country without that country's consent. It based this view on the conclusion that the de jure authority of the United States is necessarily limited by the sovereignty of other nations, citing The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).

We do not agree with this proposition, and believe that the 1980 Opinion's reliance on The Schooner Exchange v. M'Faddon was misplaced. Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such

actions constitute "controlling executive or legislative act[s]" that supplant legal norms otherwise furnished by customary international law. The Paquete Habana, 175 U.S. 677, 700 (1900).

In the early nineteenth century, the Supreme Court, speaking through Chief Justice Marshall, recognized that while customary international law may provide rules of decision in the absence of a controlling executive or legislative act to the contrary, it does not absolutely restrict the Nation's sovereign capacity to act in the international arena. Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 145-46 (1812). In The Schooner Exchange, Chief Justice Marshall opined that, under principles of customary international law, a French warship was impliedly immune from judicial process within the territory of the United States, but expressly acknowledged that "the sovereign [i.e., the United States] . . . is capable of destroying this implication. . . . either by employing force, or by subjecting such vessels to the [jurisdiction of its] ordinary tribunals." 11 U.S. (7 Cranch) at 146. In Brown, Marshall observed that the rule of customary international law

is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

12 U.S. (8 Cranch) at 128. In acknowledging the United States' sovereign authority in this area, Marshall did not attempt to draw any distinction between actions that infringe on the

territorial sovereignty of foreign nations and other types of departures from customary international law.

Since that time, the courts have repeatedly recognized that the executive and legislative branches may, in exercising their respective authority, depart from customary international law norms. See, e.g., The Paquete Habana, 175 U.S. at 700; Taq v. Rogers, 267 F.2d 664, 668 (D.C. Cir. 1959), cert. denied, 362 U.S. 904 (1960); The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925). In particular, in the exercise of his constitutional authority, the President may depart from customary international law by a "controlling executive . . . act." The Paquete Habana, 175 U.S. at 700. The 1980 Opinion utterly failed to consider the Supreme Court's recognition of the President's authority in this area.

The 1980 Opinion also concluded that the FBI could not make apprehensions in contravention of customary international law under one of its general enabling statutes, 28 U.S.C. § 533(1),² reasoning that general enabling statutes must be construed restrictively to prohibit absolutely any departure from the standards of customary international law. Again, we reject this analysis.

The FBI's general enabling statutes, 28 U.S.C. § 533(1)³ and

² The 1980 Opinion did not consider the scope of the FBI's authority under the agency's second general enabling statute, 18 U.S.C. § 3052.

³ Section 533(1) provides, "The Attorney General may appoint officials . . . to detect and prosecute crimes against the United States. . . ."

18 U.S.C. § 3052,⁴ give the FBI authority to "detect and prosecute crimes" and "make arrests" without any express geographic limitation. The Office of Legal Counsel has previously opined, and there does not appear to be any room for serious dispute, that these statutes confer extraterritorial law enforcement authority on the FBI. For example, when a foreign sovereign has consented to the FBI's conduct of an arrest within its territory, we see no basis to conclude that the FBI is powerless to do so. Thus, the narrow question presented is whether the FBI's general enabling statutes absolutely bar the FBI from undertaking extraterritorial apprehensions whenever such actions depart from customary international law. The gravamen of the 1980 Opinion is that customary international law imposes absolute restrictions on the authority of the United States to take extraterritorial action, and that these restrictions, when read into the FBI's general enabling statutes, absolutely bar the FBI from conducting extraterritorial arrests that depart from customary international law norms.

⁴ Section 3052 provides:

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

Id.

We think that this position is untenable. Both 28 U.S.C. § 533(1) and 18 U.S.C. § 3052 are broad enabling statutes that carry into execution the President's core executive law enforcement power which, where extraterritorial action is concerned, intersects with his constitutional responsibilities in the field of foreign relations. In our view, because the President has recognized authority to override customary international law, restrictions imposed by customary international law should not be read into such general enabling statutes in a manner that precludes the exercise of this authority. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). To the extent that principles of customary international law are read into these broad enabling statutes, we reject the notion that the statute must be read as transforming customary international law principles into absolute restrictions on executive action. Accordingly, the FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action either when such actions are consistent with customary international law (as with the consent of a foreign sovereign), or when the agency has been directed to do so by a "controlling executive act" that supplants customary international law.

Quite apart from the question whether the FBI has statutory authority to override customary international law in accordance with an appropriate directive from the executive or legislative branches, the 1980 Opinion failed to consider the President's inherent constitutional power to authorize law enforcement activities. Even in the absence of 28 U.S.C. § 533(1) and 18 U.S.C. § 3052, the President, in accordance with his general executive authority under Article II and his constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, nevertheless has the power to authorize agents of the Executive Branch to conduct extraterritorial arrests.

In In re Neagle, 135 U.S. 1 (1890), the Supreme Court considered the question whether the Attorney General had the authority, in the absence of an express grant of statutory authority, to assign a Deputy United States Marshal to safeguard the life of a Justice of the Supreme Court. In concluding that he did, the Supreme Court reasoned that the President's constitutional duty to see that the laws be faithfully executed is not limited to the enforcement of acts of Congress or treaties according to their terms, but extends also to the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." Id. at 64-67. In passing, the Neagle Court highlighted the President's power in the area of foreign affairs as one area in which he enjoys

considerable inherent presidential power to authorize action independent of any statutory provision. Id. at 64.

The Neagle Court's decision reflects the fundamental principle stated by John Jay that "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature. . . ." The Federalist No. 64, at 394 (C. Rossiter ed. 1961). Where, as here, the President's constitutional authority to enforce the laws intersects with his foreign affairs power, we believe that he retains the constitutional authority to order enforcement actions in addition to those permitted by statute. Commensurate with these inherent constitutional powers, this authority carries with it the power to direct Executive Branch agents to carry out arrests that contravene customary international law and other international law principles which our legislature has not acted upon to make part of our domestic law.

Our conclusions find support in the recent decision of the United States Court of Appeals for the Eleventh Circuit in Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir.), cert. denied, 479 U.S. 889 (1986). In Garcia-Mir, the Court of Appeals considered whether the United States was authorized to detain indefinitely Cuban aliens who had arrived as part of the Mariel boatlift, notwithstanding that such a detention was inconsistent with customary international law. The Attorney General had ordered the detention pursuant to 8 U.S.C. § 1227(a) which, like

28 U.S.C. § 533(1) and 18 U.S.C. § 3052, contains a broad grant of authority, but does not specifically authorize the Executive Branch to take action that departs from customary international law.⁵

With respect to one group of the Mariel detainees, the Court of Appeals concluded that there was insufficient evidence of an express congressional intention to override international law. 788 F.2d at 1453-54. The Court of Appeals nevertheless held that the President could override international law, and that the Attorney General's decision to detain the aliens indefinitely constituted a sufficient "controlling executive act." Id. at 1454-55. Garcia-Mir thus supports our general view that in an area such as law enforcement, where the President has constitutional authority and his agents have broad statutory authority, the President and high level Executive Branch officers may act in the national interest contrary to international law.

Moreover, the conclusion that the President has the authority to depart from customary international law is consistent with the very nature of customary international law. Customary international law is not a rigid canon of rules, but an evolving set of principles founded on the common practices and understandings of many nations. It is understood internationally that this evolution can occur by a state departing from

⁵ Section 1227(a) provides in relevant part, "[a]ny alien . . . arriving in the United States who is excluded under this chapter, shall be immediately deported, . . . unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper."

prevailing customary international law principles, and seeking to promote a new rule of international custom or practice (although a state remains liable under international law for breaches until a new rule develops). In the absence of authority under the Constitution to take actions departing from customary international law, the United States would be absolutely bound under its own fundamental law to international customs and practices, and largely powerless to play a role in shaping and changing those customs and practices itself. Under our constitutional system, where the President is primarily responsible for the conduct of our foreign affairs, it therefore makes sense that the President has the discretion to depart from customary international law norms in the exercise of his constitutional authority.

As my colleague Judge Sofaer will also discuss, there are instances where extraterritorial arrests without the host sovereign's consent may be justified under international law. For example, in response to an actual or threatened terrorist attack, we would have good grounds under general principles of international law to justify extraterritorial law enforcement actions over a foreign sovereign's objections. Moreover, in appropriate circumstances we may have a sound basis under international law to take action against large-scale drug traffickers being given safe haven by a government acting in complicity with their criminal enterprise. Thus, it may well be that the President will choose to direct extraterritorial arrests

only when he believes that he is justified in doing so as a matter of self-defense under international law. However, it is ultimately the President's judgment as to the need for a particular operation that is controlling for purposes of domestic law.

There may also be occasions when we are permitted to perform an extraterritorial law enforcement operation with the informal cooperation of representatives or departments of a foreign government while the government publicly withholds its formal consent. We believe that in these circumstances too we should retain the option of bringing international terrorists and drug traffickers to justice.

In closing, I want to emphasize that, as Oliver Revell will indicate, the United States strongly believes in working cooperatively with other nations and fostering respect for international rules of law, and we continue to work together with foreign governments to stem the threats that international terrorism and drug trafficking pose to the world community. The 1989 Opinion does not change that policy. Furthermore, in light of the serious international consequences that could follow from deploying the FBI to conduct an extraterritorial apprehension in contravention of customary international law, I can assure you that the Administration would take such action only in the most compelling circumstances after appropriate deliberation among the Departments of State and Justice and appropriate Executive Branch officials. The Administration is well aware that adherence to a

system of just international norms contributes to world peace and stability.

That concludes my testimony. I would be happy to address any questions that you might have.

APPENDIX B

STATEMENT
OF
ABRAHAM D. SOFAER
THE LEGAL ADVISER
U.S. DEPARTMENT OF STATE
ON
THE INTERNATIONAL LAW AND FOREIGN POLICY
IMPLICATIONS OF NONCONSENSUAL
EXTRATERRITORIAL LAW ENFORCEMENT ACTIVITIES
BEFORE THE
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 8, 1989

Mr. Chairman and Members of the Subcommittee:

It is a privilege to testify before this Committee on behalf of the State Department on the important questions of international law and policy that nonconsensual arrests in a foreign country would raise.

The Office of Legal Counsel, as the office within the Department of Justice responsible for articulating the Executive Branch view of domestic law, recently issued an opinion concerning the FBI's domestic legal authority to conduct arrests abroad without host country consent. Mr. Barr has summarized its conclusions for you. As Mr. Barr has indicated, that opinion addressed a narrow question -- the domestic legal authority to make such arrests. The opinion did not change Administration or Department of Justice policy concerning such arrests. As the White House recently made clear, an interagency process exists to ensure that the President takes into account the full range of foreign policy and international law considerations before making any such decision.

My role today is to address issues not discussed in the OLC opinion -- the international law and foreign policy implications of a nonconsensual arrest in a foreign country.

Bill Barr has explained that the Congress and the President have the power under the Constitution in various circumstances to act inconsistently with international law. That is true. The practical import of this statement of domestic legal authority, of course, must be evaluated in the context of our actual behavior as a nation. In practice, despite their power to act otherwise, each of the branches of our government has shown a healthy respect for international law.

The federal courts have treated international law as part of United States law since our early days as a nation. The Paquete Habana is probably best known, and most frequently cited, for language in Justice Gray's opinion concerning the authority of the Executive Branch to violate international law by controlling act. In fact, however, the decision in that case found no controlling Executive Act, affirmed the relevance of international law to the conduct of Executive Branch officials, and disallowed an action by a lower official because it violated international law. In reaching this conclusion, Justice Gray stated, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination". [175 U.S. 667, 700 (1900)]. Numerous subsequent cases have endorsed this conclusion.

Recent examples from the areas of terrorism and drugs, issues affecting vital U.S. interests, illustrate how Congress has considered and decided against actions which would violate international law. Thus, in passing the Omnibus Diplomatic Security and AntiTerrorism Act of 1986, Congress declined to include a provision authorizing "self-help" measures. Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing on S.1373, S.1429, and S.1508, Before the Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 63 (1985). In the 1980's Congress responded to the increasing problem of drug smuggling from the high seas, with the Anti-Drug Abuse Act of 1986. In passing the act, Congress explicitly found that the Coast Guard required foreign flag consent to board a foreign flag vessel on the high seas, and urged the Secretary of State to negotiate agreements with the relevant countries to facilitate the interdiction of drug vessels. 100 Stat. 3207-6.

Given this tradition of respect for international law, it is not surprising that our courts assume in all cases of doubt that our political branches have acted consistently with international law.

While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our nation's respect for international law is built into our domestic legal system, and the high value accorded that law in theory and practice.

Our tradition of support for international law is not simply naive American idealism. International law rules reflect the practices of nations and are based on human experience. They are therefore predictions of the type of conduct to which nations will be driven by the practical necessities of international relations. Former Secretary Kissinger explained in 1975,

An international order can be neither stable nor just without accepted norms of conduct. International law both provides a means and embodies our ends. It is a repository of our experience and our idealism--a body of principles drawn from the practice of states and an instrument for fashioning new patterns of relations between States.... The United States is convinced in its own interest that the extension of legal order is a boon to humanity and a necessity.... On a planet marked by interdependence, unilateral action and unrestrained pursuit of the national advantage inevitably provoke counteraction and therefore spell futility and anarchy....

We have reached that moment in time where moral and practical imperatives, law and pragmatism, point toward the same goals. [Statement to the Annual Convention of the American Bar Association, August 11, 1975.]

"Territorial integrity" is a cornerstone of international law; control over territory is one of the most fundamental attributes of sovereignty. Green Hackworth, one of my predecessors as Legal Adviser, explained in 1937 that "it is a fundamental principle of the law of nations that a sovereign state is supreme within its own territorial domain and that it and its nationals are entitled to use and enjoy their territory and property without interference from an outside source".

S Whiteman, Digest of International Law 183 (1965). Forcible abductions from a foreign State clearly violate this principle. In his important Survey of International Law in 1949, Sir Hersh Lauterpacht wrote of "the obligation of states to refrain from performing jurisdictional acts within the territory of other states except by virtue of general or special permission. Such acts include, for instance, the sending of agents for the purpose of apprehending within foreign territory persons accused of having committed a crime." Lauterpacht, E. (ed.), International Law, Vol. 1, 487-488 (1970). See also Section 433, Restatement 3rd of the Foreign Relations Law of the United States.

The United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity. In 1876, for example, Canadian authorities subdued a convict in Alaska in the course of transferring him between two points in Canada. Secretary Fish protested the action, contending "a violation of the sovereignty of the United States has been committed". The abducted individual was released following an official British inquiry. In another case, the Canadian government abducted two persons from the United States and brought them back to Canada for trial. After an official complaint by the United States, the Canadian government apologized and offered to return the two. Satisfied with the apology, the United States permitted Canada to try the two men for their felonies.

On the other side of the ledger, in 1872 British authorities protested the seizure by a U.S. citizen of an individual from Canada. Although the United States denied any official involvement in the abduction, the United States acceded to a British request that charges be dropped against the abducted individual, and informed the British, "I trust that I need not assure you that the government of the United States would lend no sanction to any act of its officers or citizens involving a violation of the territorial independence or sovereignty of her Majesty's dominions".

More recently, two American bail bondsmen seized an individual from Canada and brought him to Florida for trial before the State courts. After vigorous Canadian protest, and intervention by the federal government, the State of Florida released the individual; the bail bondsmen were extradited to Canada and convicted.

States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives. An array of international agreements, institutions, and practices has developed to help nations deal with the difficulties in pursuing criminals caused by our respect for each other's borders. States have voluntarily returned fugitives from justice through legal devices such as extradition, deportation, and expulsion for literally thousands of years. Where such cooperation is possible, no question of unilateral action even arises. Colombia, for example, while suffering serious threats from criminal narcotics organizations, has demonstrated strong resolve to counter the threat, and has extradited several individuals for prosecution in the United States. We are working with Colombia to counter the narcotics threat in this region of the world, and look forward to increasing our cooperation.

Further, certain forms of criminal activity have been subjected to universal jurisdiction. Multilateral conventions impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

The adverse effects of the principle of territorial integrity on law enforcement are also mitigated by the willingness of States to consent to foreign law enforcement action on their territory. No particular formality or publicity is required for such consent to be legally effective. Even tacit consent is sufficient if given by appropriate officials. For political reasons a State may decide to deny after the fact that it had consented to an operation. This would not vitiate the legality of an action, if consent had in fact been given. In still other cases, a foreign State may cooperate by quietly placing an individual wanted by the United States on board a plane or vessel over which the United States has jurisdiction.

Despite its importance, however, the principle of territorial integrity is not entitled to absolute deference in international law. Every State retains the right of self-defense, recognized in Article 51 of the UN Charter.

Thus, a State may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign State where that State is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a State does not render it unlawful.

Thus, the United States defended Israel's rescue mission at Entebbe in 1976, notwithstanding the temporary breach of Uganda's territorial integrity. The U.S. representative to the United Nations stated that "given the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impracticable." The United States was acting consistently with international law in taking forcible action against Libya in 1982 for its role in terrorist attacks against the United States. Even in the area of forcible abductions, the international community seems willing to take into account particular circumstances in assessing a violation of territorial integrity.

While the international community criticized the forcible abduction of Adolf Eichman from Argentina, it did not call for his return and even Argentina was satisfied by an Israeli expression of regret for any violation of Argentine law and sovereignty.

In considering the availability of the doctrine of self-defense to justify a breach of territorial integrity, it is essential to recognize that the President is not bound by the interpretations of international law taken by other States. The President should carefully consider those views, since the U.S. must be prepared to defend its interpretation of the law. But self-defense is a right deemed "inherent" in the Charter. Here, more than anywhere else in international law, a State must act in good faith, but must also be free to protect its nationals from all forms of aggression. State-sponsored terrorism has created new dangers for civilized peoples, and the responses of the United States in Libya and elsewhere have gained ever wider recognition as having been necessary and effective methods for defending Americans.

While the law must be given full respect even in matters of self-defense, we must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law.

We must not allow law to be so exploited, but rather must insist on the continued development of legal rules that enable states to deal effectively with new forms of aggression.

This brings me to the increasingly serious threat to the domestic security of the United States and other nations by narcotics traffickers. In recent months evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their modus operandi is to try to intimidate or disrupt the legal process in States. They have threatened violence against United States citizens, officials, and property. They have been provided safe-haven, or given approval to transit, by governments in complicity with the drug traffickers.

We are reaching the point, Mr. Chairman, at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign States without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

While international law therefore permits extraterritorial "arrests" in situations which permit a valid claim of self-defense, decisions about any extraterritorial arrest entail grave potential implications for US personnel, for the United States, and for our relations with other States. These considerations must be carefully weighed by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas (22 U.S.C. 2656 and 22 U.S.C. 3927), and by the Ambassador to the country in question, who has statutory responsibility for the direction and supervision of U.S. government employees in the country to which he or she is assigned (22 U.S.C. 3927).

The actual implications of a nonconsensual arrest in foreign territory may vary with such factors as the seriousness of the offense for which the apprehended person is arrested; the citizenship of the offender; whether the foreign government itself had tried to bring the offenders to justice or would have consented to the apprehension had it been asked; and the general tenor of bilateral relations with the United States. However, any proposal for unilateral action would need to be reviewed from the standpoint of a variety of potential policy implications.

First, such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory require plans to get those officials into the foreign State, to protect those officials while in the foreign State, to remove the officials with the person arrested from that State, and finally to bring them safely back to United States territory. While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in action, U.S. agents involved in such operations risk apprehension and punishment for their actions. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur. (In 1952, the Soviets abducted Dr. Walter Linse from the U.S. sector of Berlin to the Soviet sector, where he was tried and convicted by a Soviet Tribunal. Two of Linse's abductors were subsequently apprehended in West Berlin and sentenced for kidnapping.) Moreover, many States will not accord POW status to military personnel apprehended in support of an unconsented law enforcement action. The United States could also face requests from the foreign country for extradition of the agents.

Obviously the United States would not extradite its agents for carrying out an authorized mission, but our failure to do so could lead the foreign country to cease extradition cooperation with us. Moreover, our agents would be vulnerable to extradition from third countries they visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country. For example, U.S. courts held that Chile was not immune from suit in the United States for its involvement in the assassination of a Chilean, Letelier, in the United States. The United States could also face challenges for such actions in international fora, including the International Court of Justice.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries. The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit of U.S. law enforcement objectives.

If the United States disregards these agreed law enforcement norms and mechanisms, and acts unilaterally, we must be prepared for States to decline to cooperate under these arrangements or to denounce them. Foreign States have reacted adversely to extraterritorial US laws, even when those laws involve enforcement action taken only in the United States. The breadth of our discovery practices and antitrust laws have led some States to pass blocking and secrecy statutes that preclude cooperation with the United States. Their reaction to unconsented extraterritorial arrests could be more extreme.

Finally, we need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in United States policy concerning extraterritorial arrests.

Our policy remains to cooperate with foreign States in achieving law enforcement objectives. As the White House has emphasized, any deviation from this policy would take place only after full inter-agency consideration of the range of implicated U.S. interests.

Thank you for this opportunity to testify. I would be happy to address any questions you might have.

APPENDIX C



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

OPENING STATEMENT OF
OLIVER B. REVELL
ASSOCIATE DEPUTY DIRECTOR - INVESTIGATIONS
FEDERAL BUREAU OF INVESTIGATION
BEFORE AN OPEN SESSION OF THE
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.
NOVEMBER 8, 1989



Bicentennial of the United States Constitution (1787-1987)

GOOD MORNING MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE. I AM PLEASED TO HAVE THIS OPPORTUNITY TO APPEAR BEFORE YOU TO DISCUSS FBI EXTRATERRITORIAL JURISDICTION AND OPERATIONS ABROAD. YOU HAVE EXPRESSED AN INTEREST IN THIS AREA AND THROUGH MY PREPARED REMARKS, I WILL PRESENT THE FBI'S MANDATE IN THIS AREA, DISCUSS GENERAL PROCEDURES, AND DETAIL SOME EXAMPLES OF WHEN EXTRATERRITORIAL INVESTIGATIVE MEASURES HAVE BEEN UTILIZED IN THE AREA OF COUNTERTERRORISM.

AS A STARTING POINT, LET ME BRIEFLY TOUCH UPON THE ISSUE OF "LEAD AGENCY" STATUS RELATING TO COUNTERTERRORISM INVESTIGATIONS. IN APRIL 1982, THE REAGAN ADMINISTRATION REFINED SPECIFIC RESPONSIBILITIES FOR COORDINATION OF THE FEDERAL RESPONSE TO TERRORIST INCIDENTS. THIS MANDATE ASSIGNED TO THE U.S. DEPARTMENT OF STATE RESPONSIBILITY FOR THE COORDINATION OF COUNTERTERRORISM ABROAD. THE FBI, THROUGH THE DEPARTMENT OF JUSTICE, WAS DESIGNATED THE "LEAD AGENCY" FOR INVESTIGATING ACTS OF TERRORISM PERPETRATED IN THE UNITED STATES. IN ADDITION, THE ATTORNEY GENERAL HAS DESIGNATED THE FBI AS THE RESPONSIBLE AGENCY FOR INVESTIGATIONS ABROAD, WHEN AUTHORIZED. IN OCTOBER 1982, IN RESPONSE TO

THE GROWING PROBLEM OF TERRORISM, THEN FBI DIRECTOR WILLIAM WEBSTER ELEVATED THE COUNTERTERRORISM PROGRAM WITHIN THE FBI TO NATIONAL PRIORITY STATUS, BRINGING IT ON PAR WITH OTHER CRITICALLY IMPORTANT INVESTIGATIVE PROGRAMS SUCH AS FOREIGN COUNTERINTELLIGENCE AND ORGANIZED CRIME.

AS THE PRIMARY FEDERAL AGENCY FOR COMBATING TERRORISM IN THE UNITED STATES, THERE EXISTS WITHIN THE FBI A TWO-FOLD MISSION: TO PREVENT TERRORIST ACTS BEFORE THEY OCCUR AND, SHOULD THEY OCCUR, TO MOUNT AN EFFECTIVE INVESTIGATIVE RESPONSE. THE PREVENTION PHASE INVOLVES ACQUIRING, THROUGH LEGAL MEANS, INTELLIGENCE INFORMATION RELATING TO TERRORIST GROUPS AND INDIVIDUALS WHO THREATEN AMERICANS, U.S. INTERESTS, OR FOREIGN NATIONALS WITHIN THE UNITED STATES.

THE RESPONSE PHASE INVOLVES PROMPT AND EFFECTIVE INVESTIGATION OF CRIMINAL ACTS COMMITTED BY MEMBERS OF TERRORIST GROUPS. IT IS THE FBI'S VIEW THAT SWIFT AND EFFECTIVE INVESTIGATION OF TERRORIST ACTS, CULMINATED BY ARRESTS, CONVICTIONS, AND INCARCERATIONS, SENDS A POWERFUL AND EFFECTIVE MESSAGE TO TERRORISTS AND SERVES AS A DETERRENT TO FUTURE ACTS OF TERRORISM.

AS A RESULT OF LEGISLATION PASSED IN 1984 AND 1986, A NEW ERA BEGAN FOR THE FBI WITH EXPANDED INVOLVEMENT IN THE INVESTIGATION OF INTERNATIONAL TERRORISM. SINCE 1985, WE HAVE BEEN INVOLVED IN AT LEAST 50 SEPARATE INVESTIGATIONS OUTSIDE THE UNITED STATES, AS A RESULT OF U.S. CITIZENS OR INTERESTS HAVING BEEN TARGETED BY TERRORISTS. THIS FBI EXTRATERRITORIAL JURISDICTION IS DERIVED FROM A NUMBER OF U.S. STATUTES TO INCLUDE THE "COMPREHENSIVE CRIME CONTROL ACT OF 1984," WHICH CREATED A NEW SECTION IN THE U.S. CRIMINAL CODE FOR HOSTAGE TAKING, AND THE "OMNIBUS DIPLOMATIC SECURITY AND ANTITERRORISM ACT OF 1986," WHICH ESTABLISHED A NEW STATUTE PERTAINING TO TERRORIST ACTS CONDUCTED ABROAD AGAINST U.S. NATIONALS/INTERESTS.

THESE LAWS ALLOW THE UNITED STATES TO ASSERT FEDERAL JURISDICTION OUTSIDE OF OUR BORDERS WHEN A U.S. NATIONAL IS EITHER MURDERED, ASSAULTED, OR TAKEN HOSTAGE BY A TERRORIST. INTERNAL FBI AND DEPARTMENT OF JUSTICE OVERSIGHT, HOST COUNTRY CONCURRENCE, AND COORDINATION WITH THE U.S. DEPARTMENT OF STATE ARE PREREQUISITES IN THE IMPLEMENTATION OF THIS JURISDICTION. THE FBI IS AWARE OF THE PUBLIC ATTENTION GENERATED BY THE DEPARTMENT OF JUSTICE OPINION OF JUNE 21, 1989,

REGARDING EXTRATERRITORIAL MATTERS. HOWEVER, THIS OPINION IS A STATEMENT OF LEGAL AUTHORITY AND DOES NOT ALTER EXISTING FBI POLICY REGARDING ARRESTS IN FOREIGN COUNTRIES. FBI POLICY HAS BEEN, AND WILL CONTINUE TO BE, THAT A REQUEST FOR AN ARREST IN A FOREIGN COUNTRY WILL BE COORDINATED, APPROVED, AND CONDUCTED WITH THE APPROPRIATE AUTHORITIES OF THAT COUNTRY. ANY DEPARTURE FROM OUR CURRENT POLICY WOULD HAVE TO BE DIRECTED AND COORDINATED BY THE DEPARTMENT OF JUSTICE.

THE EXTRATERRITORIAL STATUTES HAVE AFFORDED THE UNITED STATES A LEGAL MECHANISM TO INVESTIGATE AND, WHEN WARRANTED, TO SEEK THE PROSECUTION OF TERRORISTS WHO ATTACK U.S. NATIONALS ABROAD. OUR INVESTIGATIONS OF EXTRATERRITORIAL MATTERS HAVE MET WITH CONSIDERABLE SUCCESS. NUMEROUS INDICTMENTS HAVE BEEN OBTAINED AGAINST INDIVIDUALS WHO HAVE COMMITTED SUCH ACTS, OTHERS HAVE BEEN ARRESTED AND TRIED ABROAD, AND YET OTHERS ARE CURRENTLY THE SUBJECT OF EXTRADITION REQUESTS. WHILE TIME WILL NOT PERMIT A COMPLETE REVIEW OF ALL FBI EXTRATERRITORIAL CASES, ALLOW ME TO CITE A NUMBER OF THE MORE SIGNIFICANT INVESTIGATIONS.

IN JUNE 1985, TWA FLIGHT 847 WAS HIJACKED BY SHIA TERRORISTS WHILE EN ROUTE FROM ATHENS, GREECE TO ROME, ITALY. THE HIJACKERS SUBSEQUENTLY FORCED THE AIRCRAFT TO LAND IN BEIRUT, LEBANON. FORTY-TWO AMERICANS WERE HELD HOSTAGE FOR TWO WEEKS. DURING THIS ORDEAL A U.S. SERVICEMAN WAS MURDERED. INVESTIGATION INTO THIS INCIDENT DETERMINED THAT MOHAMMAD HAMMADEI WAS ONE OF THE INDIVIDUALS RESPONSIBLE FOR THE HIJACKING. HAMMADEI WAS ARRESTED IN FRANKFURT, WEST GERMANY, BY GERMAN AUTHORITIES IN JANUARY 1987, AND THE UNITED STATES IMMEDIATELY INITIATED EXTRADITION PROCEEDINGS. HOWEVER, WEST GERMANY REFUSED THE EXTRADITION REQUEST AND INDICATED IT WOULD PROSECUTE HAMMADEI FOR MURDER AND AIR PIRACY. DURING THIS TRIAL, FBI AGENTS TESTIFIED ON THE INVESTIGATION OF THIS HIJACKING AND MURDER. HAMMADEI WAS CONVICTED IN MAY OF THIS YEAR AND SENTENCED TO LIFE IMPRISONMENT.

ALSO DURING JUNE 1985, A ROYAL JORDANIAN AIRLINER IN BEIRUT, LEBANON WAS THE TARGET OF A TERRORIST HIJACKING. BECAUSE U.S. NATIONALS WERE ABOARD THE FLIGHT, A WARRANT WAS ISSUED FOR THE ALLEGED PERPETRATOR OF THE HIJACKING, FAWAZ YOUNIS, A LEBANESE NATIONAL. IN SEPTEMBER 1987, YOUNIS WAS ARRESTED BY THE FBI IN INTERNATIONAL

WATERS IN THE MEDITERRANEAN SEA. HE WAS RETURNED TO THE UNITED STATES SHORTLY THEREAFTER. YOUNIS WAS CONVICTED IN MARCH OF THIS YEAR IN FEDERAL DISTRICT COURT IN WASHINGTON, D.C. AND SENTENCED TO 30 YEARS' IMPRISONMENT. THE FACT THAT YOUNIS WAS CAPTURED IN INTERNATIONAL WATERS SERVED NOTICE THAT THE U.S. GOVERNMENT IS WILLING TO GO TO SUBSTANTIAL LENGTHS TO APPREHEND THOSE RESPONSIBLE FOR ACTS OF TERRORISM AGAINST U.S. NATIONALS.

FOUR GUNMEN, DISGUISED AS AIRPORT SECURITY GUARDS, BOARDED PAN AM FLIGHT 73 IN SEPTEMBER 1986, AS IT WAS PREPARING FOR TAKEOFF FROM KARACHI, PAKISTAN EN ROUTE TO FRANKFURT, GERMANY; LONDON, ENGLAND; AND NEW YORK. THE FLIGHT ORIGINATED IN BOMBAY, INDIA. THE HIJACKERS WOUNDED 2 AIRPORT WORKERS AT THE START OF THE SEIGE, THEN KILLED A U.S. CITIZEN AND DUMPED HIS BODY ONTO THE TARMAC. IN ALL, 2 U.S. CITIZENS WERE KILLED. THE HIJACKERS DEMANDED THAT THE AIRCRAFT BE FLOWN TO CYPRUS WHERE 3 PALESTINIANS WERE IMPRISONED. THE TAKEOVER LASTED 17 HOURS, DURING WHICH THE 3-MAN FLIGHT CREW ESCAPED THROUGH A HATCH IN THE COCKPIT. THE SITUATION ENDED WITH A GUNFIRE EXCHANGE AND GRENADE-THROWING SPREE. THE 4 HIJACKERS CLAIMED MEMBERSHIP IN A FACTION OF THE

ABU NIDAL ORGANIZATION, A RADICAL PALESTINIAN TERRORIST GROUP. THE GOVERNMENT OF PAKISTAN PROSECUTED AND CONVICTED THE PERPETRATORS AND THEY ARE CURRENTLY SERVING LIFE SENTENCES.

THE JAPANESE RED ARMY (JRA) IS BELIEVED TO HAVE BEEN RESPONSIBLE FOR A MORTAR ROCKET/CAR BOMB ATTACK IN ROME, ITALY, IN JUNE 1987. A CAR BOMB SHATTERED WINDOWS AND SET FIRE TO 2 PARKED CARS NEAR THE U.S. EMBASSY, AND ROCKETS EXPLODED ON THE GROUNDS OF THE U.S. AND BRITISH EMBASSIES IN ROME. THE 3 EXPLOSIONS OCCURRED WITHIN A HALF-HOUR OF EACH OTHER AND HAPPENED WHILE THE VENICE ECONOMIC SUMMIT WAS IN PROGRESS. THERE WERE NO REPORTED INJURIES. A TELEPHONE CALL TO THE UNITED PRESS INTERNATIONAL OFFICE IN LONDON, ENGLAND, CLAIMED THAT THE ATTACKS WERE COMMITTED BY THE ANTI-IMPERIALIST INTERNATIONAL BRIGADE (AIIB), A SUSPECTED COVER NAME USED BY JRA OPERATIVES, IN PROTEST TO WESTERN "STATE TERRORISM" AND CONDEMNED THE STANCE OF THE VENICE ECONOMIC SUMMIT ON THE ISSUE OF TERRORISM. SUBSEQUENT INVESTIGATION BY ITALIAN AUTHORITIES AND THE FBI IDENTIFIED JRA MEMBERS AS THE PERPETRATORS OF THE BOMBINGS.

DURING APRIL 1988, A CAR BOMB EXPLODED OUTSIDE THE USO BUILDING IN NAPLES, ITALY, KILLING 5 PERSONS AND INJURING 18 OTHERS, INCLUDING 4 AMERICANS THAT WERE OUTSIDE AT THE TIME OF THE EXPLOSION. ONE OF THE DEAD WAS IDENTIFIED AS A U.S. NAVY SERVICEWOMAN; THE OTHER 4 WERE ITALIAN NATIONALS. THREE ANONYMOUS TELEPHONE CALLS WERE RECEIVED CLAIMING CREDIT FOR THE BOMBING. INVESTIGATION AT THE CAR RENTAL AGENCY, FROM WHICH THE AUTOMOBILE UTILIZED IN THE ATTACK WAS LEASED, IDENTIFIED A JRA MEMBER AS THE INDIVIDUAL WHO RENTED THE AUTOMOBILE. THIS JRA BOMBING WAS APPARENTLY INTENDED TO COINCIDE WITH ANOTHER BOMBING IN NEW YORK CITY. FORTUNATELY, YU KIKUMURA, A KNOWN JRA MEMBER, WAS ARRESTED OUTSIDE NEW YORK ON APRIL 12, 1988. IN HIS POSSESSION AT THE TIME OF HIS ARREST WERE 3 IMPROVISED EXPLOSIVE DEVICES WHICH HE HAD CONSTRUCTED.

DURING JUNE 1988, U.S. NAVY CAPTAIN WILLIAM E. NORDEEN, A U.S. DEFENSE ATTACHE, WAS KILLED WHEN A PARKED CAR EXPLODED AS HE DROVE PAST IT ON HIS WAY TO WORK IN ATHENS, GREECE. THE TERRORIST GROUP "17 NOVEMBER" CLAIMED RESPONSIBILITY FOR THE ASSASSINATION. THIS IS THE SAME GROUP WHICH HAS CLAIMED RESPONSIBILITY FOR

NUMEROUS TERRORIST ATTACKS IN GREECE. SINCE 1975, "17 NOVEMBER" HAS CLAIMED RESPONSIBILITY FOR 7 ATTACKS AGAINST U.S. TARGETS IN GREECE, INCLUDING THE ASSASSINATIONS OF RICHARD WELCH, SPECIAL ASSISTANT TO THE U.S. AMBASSADOR IN ATHENS IN 1975, AND CAPTAIN GEORGE TSANTES, CHIEF OF THE U.S. NAVY MISSION IN GREECE IN 1983.

PAN AM FLIGHT 103 EXPLODED AND CRASHED AT LOCKERBIE, SCOTLAND, IN DECEMBER 1988, KILLING 270 PEOPLE. THIS INCIDENT HAS THE EARMARK OF A WELL-ORCHESTRATED ACT OF TERRORISM. THIS AIR DISASTER IS PROOF OF THE DEVASTATING POTENTIAL FOR LOSS OF LIFE AND DESTRUCTION OF PROPERTY AT THE HANDS OF TERRORISTS.

THE PAN AM 103 INCIDENT VIVIDLY ILLUSTRATES THE INTERNATIONAL COOPERATION AND COMPLEX COORDINATION NECESSARY TO CONDUCT AN EXTRATERRITORIAL INVESTIGATION AFTER A TERRORIST ACT HAS OCCURRED. FOR EXAMPLE, FOLLOWING THE INCIDENT AND HOST COUNTRY INVITATION, THE FBI DISPATCHED NUMEROUS PERSONNEL TO SCOTLAND, ENGLAND, AND WEST GERMANY IN PURSUIT OF THIS INVESTIGATION TO INCLUDE INTERVIEWS, RECORDS REVIEWS, AND FORENSIC COLLECTION AND EXAMINATION. BRITISH, SCOTTISH, GERMAN, AND U.S. LAW

ENFORCEMENT REPRESENTATIVES HAVE BEEN WORKING CLOSELY TOGETHER AND ARE ENGAGED IN EXTENSIVE CONSULTATION ON ALL ASPECTS OF THIS COMPLEX INVESTIGATION. IN THE UNITED STATES, ATTORNEY GENERAL DICK THORNBURGH, SECRETARY OF TRANSPORTATION SAM SKINNER, CENTRAL INTELLIGENCE AGENCY DIRECTOR WILLIAM WEBSTER, FBI DIRECTOR WILLIAM SESSIONS AND NUMEROUS OTHER SENIOR OFFICIALS INVOLVED IN THIS CASE, HAVE ACTIVELY CONSULTED AND EXCHANGED INFORMATION WORKING TOWARD A SOLUTION TO THIS MOST HEINOUS ACT. THIS CRIME MUST BE SOLVED AND THOSE RESPONSIBLE IDENTIFIED AND BROUGHT TO JUSTICE.

IN APRIL OF THIS YEAR, U.S. ARMY COLONEL JAMES N. ROWE WAS ASSASSINATED IN MANILA, PHILIPPINES BY AUTOMATIC WEAPON FIRE WHILE TRAVELING IN HIS CAR. HIS DRIVER WAS SLIGHTLY WOUNDED IN THE ATTACK. INVESTIGATION HAS DETERMINED THAT THERE WERE 6 TO 7 ASSASSINS, 4 WERE IN THE AMBUSH VEHICLE AND 2 OR 3 WERE IN A BACK-UP VEHICLE. THE NEW PEOPLE'S ARMY (NPA), THE MILITARY ARM OF THE PHILIPPINE COMMUNIST PARTY, CLAIMED CREDIT FOR THE ATTACK. THE FBI IMMEDIATELY DISPATCHED INVESTIGATORS AND FORENSIC EXPERTS TO WORK WITH PHILIPPINE LAW ENFORCEMENT AUTHORITIES. BASED UPON THIS COOPERATIVE EFFORT,

ON JUNE 16, 1989, DONATO B. CONTINENTE, AN NPA MEMBER, WAS ARRESTED BY THE PHILIPPINE CONSTABULARY CRIMINAL INVESTIGATIVE SERVICE (CIS) AND CHARGED AS AN ACCESSORY TO THE MURDER OF COLONEL ROWE. ON AUGUST 27, 1989, NPA MEMBER JUANITO ITAAS WAS ARRESTED BY THE CIS AND CHARGED WITH THE MURDER. AN EYEWITNESS POSITIVELY IDENTIFIED ITAAS AS ONE OF THE GUNMEN. UPON CONFESSING, HE FURTHER IDENTIFIED SEVEN OTHER INDIVIDUALS INVOLVED IN THE ATTACK. ARREST WARRANTS HAVE BEEN ISSUED BY PHILIPPINE AUTHORITIES.

ON MAY 24, 1989, TWO U.S. CITIZENS WERE SHOT TO DEATH IN FRONT OF THEIR RESIDENCE IN LA PAZ, BOLIVIA, BY TWO INDIVIDUALS IN A VAN. THE VICTIMS WERE MISSIONARIES OF THE MORMON CHURCH. A GROUP NAMED "FUERZAS ARMADAS DE LIBERACION ZARATE WILLCO" CLAIMED RESPONSIBILITY FOR THE ATTACK. AGAIN, THE FBI DISPATCHED A TEAM OF INVESTIGATORS TO WORK CLOSELY WITH BOLIVIAN LAW ENFORCEMENT PERSONNEL. AS A DIRECT RESULT OF THIS JOINT INVESTIGATION, THIS SAME GROUP WAS IMPLICATED IN THE ATTEMPTED BOMBING OF THE MOTORCADE OF FORMER SECRETARY OF STATE GEORGE SCHULTZ IN LA PAZ DURING AUGUST 1988. FOUR INDIVIDUALS HAVE BEEN ARRESTED BY BOLIVIAN AUTHORITIES AND OTHERS

ARE BEING SOUGHT AS FUGITIVES.

TO ASSIST IN FBI EXTRATERRITORIAL PURSUITS, THE FBI MAINTAINS LEGAL ATTACHE OFFICES IN 16 FOREIGN COUNTRIES. THE PRIMARY MISSION OF FBI LEGAL ATTACHE OFFICES IS TO ESTABLISH AND SUSTAIN EFFECTIVE LIAISON WITH PRINCIPAL LAW ENFORCEMENT, INTELLIGENCE, AND SECURITY SERVICES THROUGHOUT DESIGNATED FOREIGN COUNTRIES THEREBY PROVIDING CHANNELS THROUGH WHICH FBI INVESTIGATIVE RESPONSIBILITIES CAN BE MET. THE LEGAL ATTACHE FUNCTION ALSO PROVIDES FOR A PROMPT AND CONTINUOUS EXCHANGE OF LAW ENFORCEMENT INFORMATION.

LEGAL ATTACHES AND ASSOCIATED LIAISON ACTIVITIES PLAY A VITAL ROLE IN THE SUCCESSFUL FULFILLMENT OF THE RESPONSIBILITIES OF THE FBI ABROAD. THESE ACTIVITIES ARE MAINTAINED IN STRICT ACCORDANCE WITH LIMITATIONS IMPOSED BY STATUTE, EXECUTIVE ORDER, ATTORNEY GENERAL GUIDELINES, AND FBI POLICY. BUT THIS IS NOT A "ONE WAY" STREET. THE FBI ASSISTS COOPERATIVE FOREIGN AGENCIES WITH THEIR LEGITIMATE AND LAWFUL INVESTIGATIVE INTERESTS IN THE UNITED STATES, CONSISTENT WITH U.S. POLICY REGARDING "FOREIGN POLICE COOPERATION" MATTERS.

IN CONCLUSION, I WOULD STRESS THAT THE FBI INTERNATIONAL COUNTERTERRORISM PROGRAM IS A STRONG AND EFFECTIVE PROGRAM. THIS IS IN PART DUE TO OUR EXPANDED ROLE IN EXTRATERRITORIAL MATTERS WHICH HAS LED TO GROWING AND IMPROVED LAW ENFORCEMENT RELATIONSHIPS WITH FRIENDLY FOREIGN GOVERNMENTS. HOWEVER, WE RECOGNIZE THAT THERE IS MUCH TO BE DONE IN ORDER TO CONTINUE OUR SUCCESS IN COMBATING TERRORISM. THROUGH ENHANCED COOPERATION, BETTER SHARING OF INFORMATION, AND IMPROVED INVESTIGATIVE TECHNIQUES WE WILL STRIVE TO KEEP AMERICANS WORLDWIDE FREE FROM THE THREAT OF TERRORISM.

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE, THIS CONCLUDES MY PREPARED REMARKS. I WILL NOW ADDRESS ANY QUESTIONS.